IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	Cause No: 1:13-cr-00150 WTL-TAB-01
v.	)	
	)	
GUOQING CAO,	)	
	)	
Defendant	)	

GUOQING CAO'S RESPONSE TO GOVERNMENT'S EX PARTE REQUEST FOR PROTECTIVE ORDER

Preliminary Statement

The Government on October 28, 2013, filed an *ex parte* application for entry by the Court of its proposed Protective Order (Doc. #66-67). Counsel for defendant Guoqing Cao have prepared, and tendered to the Government for its consideration, an alternative version of a protective order which is more consonant with the defendant's rights to discovery under Fed. R. Crim. P. 16(a), the limited scope of trade secret protection under the statutory section defining the crime charged here, 18 U.S.C. § 1839, and the work product protection to which defense counsel is entitled. (A copy of the defense-proposed protective order is attached as Exhibit A). Counsel for defendant Shuyu Li endorses the defense version of a protective order.

In the usual course of event, the parties would have discussed their respective concerns and only then moved before the Court to obtain approval or disposition of disputed issues. The Government's application was filed prior to undertaking such discussions.

Before turning to the Government's proposal, we note our objection to the Government's use of an *ex parte* submission to promote its adoption by the Court, and request that the sealed submission be unsealed at least as to defense counsel, if not the defendants. Given the defendants' Fifth and Sixth Amendment rights, it should be a very rare case where a court's ruling as to the rights of defendants is predicated on an *ex parte* showing by the prosecution. Preventing defense counsel from seeing such a submission precludes them from representing their clients' interests adequately in responding to it.

Mr. Cao objects to many aspects of the Government's proposed Protective Order: (i) it is overbroad, sweeping into its highly restrictive rules about document access and log-keeping any piece of paper or point of information which finds its source in Eli Lilly and Company, when it is plain that a wide range of Lilly materials (e.g., personnel records, payroll records, protocols allegedly established and observed to ensure secrecy, identities of employees with exculpatory information, and much more to which defendants are entitled in discovery) do not in any sense merit confidential treatment in the hands of the defense; (ii) it effectively prevents Mr. Cao from retaining qualified experts active in the pharmaceutical field, consulting or testifying, since the defined pool of eligible defense experts is an impossibly shrunken sliver of the expert world; (iii) it shreds work product protections by requiring that the Government be supplied with attendance logs of persons who review confidential material and by requiring that the Government and/or Lilly approve of any experts; and (iv) it sets up the Government as the sole judge and jury as to what qualifies for confidential treatment, and affords no opportunity for the kind of challenge to that designation which is common to the most basic civil case protective order.

The last point is particularly ironic, because if Mr. Cao's memorandum in support of his motion for independent review of bail (Doc. #57) shows anything, it is that the Government, working in tandem with Lilly, has substantially overstated the secrecy attendant to the charged "Trade Secrets." There, we showed that as to the only "Trade Secrets" alleged to have been transmitted by Mr. Cao, i.e., "Trade Secrets" 1-3, each had earlier been largely revealed in the public domain, most through Lilly-sponsored publications and most of those authored by Mr. Cao, years before the charged August 2011 disclosure. If the Government started in the Court's view with the credibility necessary to arrogate to itself the sole and exclusive right to designate "secret" discovery materials, then we submit, it divested itself of that credibility through the over-designation or mis-designation seen in the Superseding Indictment. This circumstance makes it all the more important that the Court, and not the prosecutor, have the final say in whether a particular item or category of discovery truly merits being placed under lock and key and other restrictive conditions.

We set forth below a comparative analysis of the two proposals. In a fashion intended to better assist the Court to compare them and to facilitate the resolution of disagreements between the parties, we have: (a) identified the subject matter which the Government apparently intends its proposal to address in particular provisions: (b) identified the provision(s) in the Government proposal which pertains; (c) identified the provision(s) in the defense proposal, if any, which pertains and highlighted important changes, if any; and (d) provided our rationale for the change(s) we have suggested.

I. SCOPE OF DISCOVERY MATERIALS

a) Government proposal:

1. The government shall provide defense counsel a copy of its discovery materials, including any **suspected** trade secrets, confidential and proprietary information, property and/or contraband contained therein (emphasis added).

b) Defense proposal:

1. This Stipulated Interim Protective Order applies only to discovery materials or information (”Material”) provided by the government to the Defendants and defense counsel which qualify under the terms of Paragraph 3 below as “Restricted” and is not intended in any way to limit or circumscribe the government’s discovery obligations established pursuant to Fed. R. Crim. P. 16, 18 U.S.C. § 3500, the *Brady* and *Giglio* decisions, any pertinent decisional law or rules of the Seventh Circuit Court of Appeals of or the Southern District of Indiana, or any discovery order of this Court.

c) Rationale for changes:

We object to, and do not understand, the use of the adjective “suspected” in connection with trade secrets and confidential information, nor the use of the term “contraband” in that connection. Material and information either is a trade secret under 18 U.S.C. § 1839 or it is not. While that final determination may ultimately for be for the Court on motion or a jury, we can all agree that the Government’s “suspicions” are irrelevant, since it is not the owner of any secret, and we can all at least expect the alleged secrets-owner, Lilly, to certify to its considered view – not its “suspicion” – that the statutory definition is met as to particular items (Paragraph 3 of the defense version, discussed below, seeks precisely that Lilly certification. As a prima facie matter, if the alleged secret-owner will not so certify, then it is difficult to comprehend why this case is proceeding at all.)

If this Court were met in a civil context with an application seeking temporary restraints, then it would very likely require at a minimum that the plaintiff verify that its allegations are true. It is difficult to understand, then, how a trade secrets case can proceed even through discovery if the alleged secrets-owner lacks the courage of its convictions to certify that its facts are true. That is a minimal level of accountability which is to be expected.

Also, the Government's definition in its Paragraph 1 of what material requires special protection ("suspected" trade secret and confidential items, although it's entirely unclear as to suspected by whom) appears to be varied by the Government in Paragraph 2 of its proposal, which instead defines the material in need of protection ***differently*** than it does in Paragraph 1: "materials that include or reference Lilly material or information in any way, directly or indirectly …." The latter would literally include such obviously non-trade secret matters as the Lilly-branded pamphlet on the table in its main public reception room.

The result is confusing, contradictory, and unworkable. The defense proposal instead, in our Paragraph 3 below, defines unambiguously and in one place what may be restricted, and it is grounded in the trade secrets statute at the heart of this case. The defense proposal requires a Lilly certification – not the prosecution's speculation as to what might be "suspected" trade secrets – to initially justify more restrictive handling, marking and access than other discovery materials which are wholly outside the protective order. Then, the defense proposal establishes a formal opportunity in its Paragraph 4, as is common in civil protective orders, to challenge that designation.

II. RESTRICTIONS ON ACCESS TO DESIGNATED MATERIALS – HOW PROTECTED MATERIALS ARE DEFINED; WHO HAS ACCESS TO THEM; HOW THEY ARE TO BE MAINTAINED

a) Government proposal:

2. Defense counsel and their office staff, including paralegals, legal assistants, investigators, and secretaries, (collectively "the defense") and the Defendants shall maintain these ***discovery materials that include or reference Lilly material or information in any way***, directly or indirectly, including any copies the defense makes, as follows:

a. The defense and Defendants shall use the discovery materials solely and exclusively in connection with this case (including investigation, trial preparation, trial, and appeal), and not for any commercial or other purpose.

b. Any copy of the discovery materials shall be maintained by the defense at their law firm in a locked room. If the discovery materials are maintained in a room where other matters are present, the discovery materials shall be secured in a locked receptacle within the room.

c. A copy of this Stipulated Interim Protective Order shall be kept with the copies of the discovery materials at all times.

d. The only persons who may view the discovery materials are the defense, the Defendants, and any experts designated by the defense (as detailed below). The Defendants may access and view the discovery materials solely in the presence of counsel and under the direct supervision and control of counsel. The Defendants may take notes regarding the discovery materials only in the presence of counsel, said notes to remain with counsel in a locked room at their respective offices.

e. All persons viewing the discovery materials, any document based on the discovery materials, or having any discovery materials described to them, shall not have any access until each has certified that they have read, understand, and agree to the terms of this Stipulated Interim Protective Order and have manifested their assent to be bound thereby, and to be subject to the jurisdiction of the Court for the purpose of proceedings relating to the performance under, compliance with, or violation of this Stipulated Interim Protective Order, by signing a copy of the attached "Acknowledgment of Stipulated Interim Protective Order in *United States v. Cao, et al.*, CAUSE NO.: 1:13-cr-00150-WTL-TAB." If the criminal number assigned to this case changes, the new criminal number shall be used in place of the presently assigned case number. Once a person has executed an Acknowledgment, it shall not be necessary for that person to sign a separate Acknowledgment each time that person is subsequently given access to discovery materials. The defense shall deliver each signed acknowledgment to a Lilly representative designated to filter the names for possible concerns and conflicts 48-hours before the material is shared, and a copy shall be maintained by counsel for Defendants. The Lilly representative shall not communicate the names of the individuals to the government unless and until an issue arises. The defense shall not provide access to the discovery materials until the Lilly representative acquiesces, said position to be made known within 48-hours unless additional time is agreed to by the parties.

f. In no event shall the defense or the Defendants disclose or describe any of the discovery materials to any other person or entity other than the government or the Court. Should the defense or Defendants need to disclose or describe any of the discovery materials to this Court, it shall do so under seal in hard copy. None of the discovery materials shall be filed electronically. Should the defense or Defendants need to disclose or describe any of the discovery materials to any other court or during any other legal proceedings, it shall do so only with notice to the government and after gaining permission from the Court.

g. The defense and Defendants may describe or provide copies of the discovery materials to any expert retained by them, whether testifying or non-testifying, but only if:

(1) The defense and Defendants disclose the expert's identity and resume to the government 14 days beforehand. If the government objects during this 14-day period, the defense and Defendants shall not disclose the discovery materials to the identified expert until this Court rules on the objections and response.

(2) The defense and Defendants may not employ an expert who works as a consultant, employee, officer, owner, or agent of a competitor to Eli Lilly & Company. Moreover, any expert retained by the defense or Defendants shall not work as a consultant, employee, officer, owner, or agent of a competitor to Eli Lilly & Company for five years following final resolution of this case. These restrictions may be modified only for good cause shown on motion to the Court.

(3) The expert must sign a copy of the Acknowledgment of Stipulated Interim Protected Order, and by doing so, agree to maintain the discovery materials in accordance with the above procedures as if they were members of the defense, and solely for the purposes of assisting the defense in this case, and not for any commercial or other purpose.

(4) The procedures outlined above shall govern the expert's use, maintenance, disclosure, and safekeeping of the discovery, except that the expert may review the discovery materials at their offices, but only under the same secure conditions provided above. After any review, the expert shall return to defense counsel the discovery materials to be maintained securely under the conditions provided above and defense counsel shall provide to the government written confirmation of receipt and compliance within five business days of receipt.

b) Defense proposal:

2. Any Material which qualifies pursuant to Paragraph 3 below as “Restricted” shall be marked by the government on the first page with the legend “LITIGATION USE ONLY” at the time the Material is made available for inspection and when copies are produced to the Defendants and their counsel The inadvertent failure to designate Material as “Restricted” may be remedied by supplemental written notice promptly given by the government and may be retroactively designated in the same manner and shall be treated appropriately from the date written notice of the designation is provided to the Defendants and their counsel.

3. Consistent with 18 U.S.C. § 1839(3), ***material may be designated as “Restricted” if a responsible officer of Eli Lilly certifies to the government – with a copy of the certification provided with the “Restricted” Material to defense counsel – that particular***

Material identified by Bates or production number(s), or a specified portion of such material, is:

a. a pattern, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs or codes; and

b. that Eli Lilly is the owner thereof and has taken reasonable measures to keep such information secret; and

c. that the information therein derives independent economic value to Eli Lilly, actual or potential, from not being generally known to, and not being readily ascertainable through proper means, by the public; and

d. that the information therein is non-public at the time of the Certification.

4. If any Defendant contests the government's designation of any Material as "Restricted," then that Defendant may seek review of such designation by the Court.

5. Defense counsel and their office staffs, including paralegals, legal assistants, investigators, and secretaries (collectively "the defense") and the Defendants shall maintain and use Material designated as "Restricted," including any copies made by the defense, as follows:

a. solely and exclusively in connection with this case (including investigation, trial preparation, trial and appeal), and not for any commercial or other purpose.

b. any copy of the "Restricted" Material shall be maintained by the defense in a locked cabinet(s) within their offices or, if in electronic form, on a laptop or other computer maintained in the locked offices of defense counsel.

c. a copy of this Stipulated Interim Protective Order shall be kept with the copies of the "Restricted" Material at all times.

d. the only persons who may view the "Restricted" Material are the defense, the Defendants, and any experts designated by the defense (as detailed below). The Defendants may access and view the "Restricted" Material solely in the offices of defense counsel and under the supervision and direction of counsel. The Defendants may take notes regarding the "Restricted" Material, said notes to remain with counsel in a locked cabinet(s) in their respective offices.

e. in no event shall the defense or the Defendants disclose or describe any "Restricted" Material to any other person or entity other than the government, the Court, or any expert retained by defense counsel (subject to the provisions below) or any potential witness identified by defense counsel. Should the government, defense or Defendants need to disclose or describe any of the "Restricted" Material to this Court, it shall do so under seal in hard copy. None of the discovery materials shall be filed electronically. Should the government, defense or Defendants need to disclose or describe any of the "Restricted" Material to any other court or during any other legal proceedings, it shall do so only with notice to the adverse party and after gaining permission from the Court.

f. the government, defense and Defendants may describe or provide copies of the "Restricted" Material to any expert retained by them, whether testifying or non-testifying, but only if:

i. neither the government nor the defense and Defendants may employ an expert who works as a consultant, employee, officer, owner, or agent of a competitor to Eli Lilly & Company, as such "competitors" are identified on the list attached as Exhibit A hereto. This restriction may be modified only for good cause shown on motion to the Court.

ii. any such expert must sign a copy of the Acknowledgment of Stipulated Interim Protected Order, in the form attached as Exhibit B hereto, and by doing so, agree to maintain the "Restricted" Material in accordance with the above procedures applicable to the defense, and solely for the purposes of assisting one of the parties to this case, and not for any commercial or other purpose.

iii. ***the government and defense counsel shall maintain, for in camera submission to the Court if and when requested by the Court, each signed acknowledgment.***

iv. the procedures outlined above shall govern the expert's use, maintenance, disclosure, and safekeeping of the "Restricted" Material, ***except that the expert may review the "Restricted" Material at his/her offices, but only under the same secure conditions provided above.***

c) Rationale for changes:

There are several, fundamental problems with the Government's proposal in this area. We address each in turn below.

1. The government casts too wide a net in proposing the body of materials to which any restrictions should attach

As noted above, in defining the restriction-necessary discovery materials, the Government's proposed Protective Order first restricts the use of and access inconsistently to "suspected" trade secrets, etc. (Paragraph 1 of Government proposal) and then to "discovery materials that include or reference Lilly material or information in any way, directly or indirectly …." (Paragraph 2 of same). The first is too vague to be sensibly applied to anything, and the second would encompass the entire world of Lilly-related documents and information, to include any piece of paper bearing a Lilly logo, coming from Lilly, or from a third party which merely mentions Lilly.

The criminal code prohibits knowing misappropriation solely of one category of intellectual property -- trade secrets. All the rest is a civil dispute at best. But, as noted, the Government's proposal goes beyond true trade secrets, however that designation is reliably made in the first instance. The defense is entitled under Rule 16(a)(1) to a broad range of "Lilly material or information," much of which is likely not secret in any sense and much of which is not even technical or scientific, including all personnel/payroll records relating to our clients; all documents establishing that Lilly followed the precautionary measures required by Section 1839 to qualify information as a "trade secret;" all applicable Lilly policy manuals and personnel directives; all Lilly material transfer and confidentiality agreements with outside parties concerning the subject of the alleged "Trade Secrets;" all emails sent to or received by our clients, not just the handful seized upon in the indictment, many of which could be entirely personal in nature; and so on, at length. The Government's proposal would render all such non-technical and non-scientific material subject to its lock-and-key, logging, and expert-limited provisions, and do so entirely unnecessarily.

The Court of Appeals for the Seventh Circuit has made clear that such overbroad protective orders are strongly disfavored, even in civil cases where the liberty of the parties is not at stake and where constitutional rights are not at issue. In *Union Oil Co. of Ca. v. Leavell,* 220 F.3d 562 (7th Cir. 2000), a commercial trade secrets dispute in which the parties filed nearly every document under seal with the district court's ready acquiescence, the appeals court noted that:

> Litigation about trade secrets regularly is conducted in public; the district court seals only the ***secrets*** …; no one would dream of saying that every dispute about trade secrets must be litigated in private. Even disputes about claims of national security are litigated in the open.

Id., at 567 (citations omitted) (emphasis in original). In *Baxter Int'l, Inc. v. Abbott Labs.,* 297 F.3d 544 (7th Cir. 2002), a commercial trade secret dispute involving, as here, a pharmaceutical manufacturer, the parties had jointly moved to seal as confidential a mass of discovered materials. We do not know here what blanket justification was provided by the Government in *ex parte* fashion to justify its equally-overbroad proposal to this Court, but the Seventh Circuit was dissatisfied with the rationale offered in *Baxter*:

> Beyond asserting that [a licensing agreement] must be kept confidential because we say so …, this [proposal] contends only that disclosure "could … harm Abbott's competitive position." How? Not explained. Why is this sort of harm (whatever it may be) a legal justification for secrecy in litigation? Not explained. Why is the fact that some other document contains ***references*** to a license sufficient to conceal the referring document? Not explained.

Id., at 547 (emphasis in original). Whatever rationale was provided to this Court, which doubtlessly referenced potential harm to Lilly if its non-trade secret information was not severely locked down tight, any such one-size-fits-all justification would violate the principles of *Baxter,* which cannot hold with less force in a criminal case. *See In re Continental Illinois Sec. Lit,* 732 F.2d 1302, 1308 (7th Cir. 1984) (policy reasons underlying right of access to documents applies in both criminal and civil cases) (citations omitted); *IDX Systems Corp. v. EPIC Systems Corp.,* 285 F.3d 581, 583-84 (7th Cir. 2002) (civil case brought under Wisconsin's trade secrets act, similar to 18 U.S.C. § 1839; in affirming summary judgment against the plaintiff, the alleged trade secret owner, appeals court noted that IDX had failed to properly identify the trade secrets purportedly misappropriated; "It has been both too vague and too inclusive, effectively asserting that all information in or about its [medical billing practice] software [allegedly taken by a former employee to the defendant entity] is a trade secret. That's not plausible – and, more to the point, such a broad assertion does not match up to the statutory definition … Which aspects are known to the trade, and which are not? That's vital under the statutory definition").

While the *Union Oil* and *Baxter* cases did not directly involve prospective discovery orders, the same court in *Citizens First Nat. Bank of Princeton v.*

Cincinnati Ins. Co., 178 F.3d 943 (7th Cir. 1999) was similarly critical in reviewing a prospective civil discovery protective order which would have authorized either party to simply designate as confidential any document "believed to contain trade secrets or other confidential or governmental information, including information held in a fiduciary capacity." *Id.,* at 944. Then-Chief Judge Posner, writing for the court, held such a protective order "invalid," observing that a standard which relies merely on a "belief" that a document contained a trade secret was "a fudge," that document-redaction would suffice to protect true trade secret information, and that the standard proposed was "absurdly overbroad … giving each party carte blanche to decide what portions of the record shall be kept secret." *Id.,* at 945. Instead, an appropriate protective order may allow the parties to keep their trade secrets "or some other properly demarcated category of legitimately confidential information" secret, as long as the district court is satisfied "that the parties know what a trade secret is and are acting in good faith in deciding which parts of the record are trade secrets, and as long as the court "makes explicit that each party … can challenge the secreting of particular documents." *Id.*, at 946. "[S]tandardless, stipulated … overbroad blanket order[s]" should be avoided. *Ibid.* *See also Rochlin v. Cincinnati Ins. Co.,* 2006 WL 897894, *1 (S.D. Ind., Apr. 5, 2006) (denying request to seal the record where information "was never a trade secret and is now more than four years old").

Only the defense proposal, and not the Government's, provides for some justification for secreting materials (i.e., a signed certification from a Lilly representative) and provides a ready review mechanism for challenge (the Government's proposal only provides in its Paragraph 2(g)(2) for relief from its denial of a defense expert upon good cause). Our proposal, and assuredly not the Government's, meets the requirements of the Seventh Circuit cases.

2. The Government too severely restricts who the defense may retain as an expert and requires notice to it and its approval before even a non-testifying expert may review discovery materials

In its ardor to control and limit the persons who may be engaged as experts by the defense, the Government has required a multi-tiered regime of interlocking Government-Lilly approvals, and also established multiple conditions required to be met by any prospective expert, which cannot in reason be met.

As for consent and control, in Paragraph 2(e) of its proposal, the Government first would require the defense to provide 48 hours prior to sharing any restricted material the signed acknowledgments required of anyone, including potential and engaged experts, viewing restricted materials to Lilly "for possible concerns" (whatever those might be), which may then share them with the prosecutors if "an issue" arises (whatever that might be). Contradictorily, in Paragraph 2(g) of its proposal, the Government would require fourteen (14) days' advance notice of the name and resume of any expert whom the defendants propose to engage to review critical materials in this case. Those provisions are inconsistent on their face, but they are emblematic of an effort to tilt the proverbial playing field in favor of the Government-Lilly.

If that were not bad enough, the Government would also block the engagement of any expert, testifying or not, who "works as a consultant, employee, officer, owner, or agent of a competitor to Eli Lilly & Company" and would prohibit any defense-engaged expert from "work[ing] as a consultant, employee, officer, owner, or agent of a competitor to Eli Lilly & Company for five years following final resolution of this case."

Collectively, these provisions are unsupportable – they effectively allow the Government and its partner, Eli Lilly and Company, to review, approve or veto, and monitor everything done by the defendants and counsel to defend this action. Such a web of notice/approval provisions would be constitutionally indefensible in a case involving even classified national security information. They are wholly intolerable in a commercial data case involving already–public data about failed research and development efforts where, ***even if the Government's theory of the case is correct, the "trade secrets" were divulged two (2) years ago and are loose in the world.***

The provisions requiring notice and approval of the Government or Lilly flies directly in the face of Rule 16(b)(1)(C). The Rule does not require the defense to advise the Government even of the identity of its testifying experts, unless and until the defense has requested a like disclosure from the Government, and protects altogether against any disclosure of the identities of consulting experts as attorney work-product. The Government itself has, in other circumstances, claimed such a right to protect expert information as work product. *See Barouch v. U.S. Dept. of Justice,* 2013 WL 4494686, *24 (D.D.C., Aug. 23, 2013) (court denied FOIA request by inmate for certain DOJ records relating to his concluded criminal case, including communications and emails received by prosecutors from "experts in the field;" held that such exchanges with presumably non-testifying experts were protected by the attorney work product doctrine, a category of records exempted by FOIA from disclosure). The Government's proposal would effectively abrogate this Rule section and this essential work product protection.

Apart from insisting on vetting defense experts with its partner, Lilly, the Government proposal also seeks to dramatically shrink the pool of scientists even willing to stand for an individual against a pharmaceutical giant. The Government proposal restricts the pool to persons both (i) currently not working for any "competitor" of Lilly, with that term going undefined, and (ii) willing to be excluded, world-wide, from such employment for the five years following the conclusion of this action. This, of course, is in addition to a general prohibition which applies to prevent all persons, including experts, from using the restricted material outside the confines of this case.

The expert witness non-compete provision, applicable without geographic limitation or competitor definition, and for a five-year period, is improper for the reasons set forth below. The defense proposal sees no need for a non-compete provision, in light of what is an agreeable blanket non-disclosure provision. Paragraph 2(a) of the Government proposal would prevent any person from disclosing outside this case any "discovery materials." As noted previously, the Government's various definitions of the protected material are overbroad and the selection standards offered by the Government unsuited, and the resulting unfettered discretion given the Government to make such designation under its proposal runs counter to Seventh Circuit guidance and principles. But if properly reframed, as in the defense proposal, we would have no objection to a perpetual non-disclosure commitment. The Government proposal requires any expert to sign an acknowledgment of the protective order and undertaking to abide by its terms (Par. 2(g)(3)). While a non-disclosure requirement as to truly and narrowly defined "trade secrets" is unobjectionable, the additional of a gratuitous non-compete proviso as an additional hurdle to finding a willing expert is inappropriate.

If Lilly had tendered to any of its employee-scientists an employment agreement which combined a perpetual non-disclosure of confidential information with a five (5) year non-compete provision of the kind sought to be used by the Government to limit possible defense experts, then it would likely be unenforceable in the civil courts of Indiana. Indiana courts do allow broader restrictions upon disclosure of trade secret or confidential information than they permit as to employment, but still enforce those restrictions only in the affected area of the business of the employer. *Bodemer v. Swanel Beverage, Inc.,* 884 F. Supp.2d 717, 731 (N.D. Ind. 2012) (citations omitted). Even if conceptually enforceable, the agreement not to disclose must be precise in identifying the trade secret information in order to be reasonable; a confidentiality agreement "cannot make secret that which is not secret." *Id.,* at 734 (citation omitted). An imprecisely drawn non-disclosure provision is prohibited if the result is that the employee is arguably prevented from using his/her general knowledge or experience in another job. *Id.,* at 735. So, a provision which prevents disclosure of "any business information" – as the Government would prohibit disclosure of any "Lilly material or information" such as where it has offices, how many people work in production as opposed to research and development etc. – is not enforceable. *Id.,* at 735-36.

As for the Government's five-year prohibition on competitive employment anywhere, Indiana's courts hold that non-compete covenants in employment contracts restrain trade and are disfavored generally, construed against the employer, and must be reasonable. *Central Ind. Podiatry, P.C. v. Krueger,* 882 N.E.2d 723, 727 (Ind. 2008). As the *Bodemer* court noted recently, there is no Indiana court decision of which it was aware which permitted a non-compete covenant, even in a trade secret environment, to "apply to the entire world," 884 F. Supp.2d at 732, as does the Government's proposal here.

The provision which bars the use of any expert, testifying or otherwise, who works for "a competitor to Eli Lilly & Company" gives the Government and its ally, Lilly, unfettered discretion to disapprove any defense expert because the proposal makes no effort to identify what it means to be a Lilly "competitor." That term could be read to subsume all companies in the entire pharmaceutical industry; commercial scientific laboratories which study principles of basic science which underlie downstream drug development; and even academics whose universities have research partnering arrangements or joint ventures with companies in the private pharmaceutical industry. No one would be left except for committed retirees.

The defense proposal, on the other hand, requires Lilly to identify by name on an attached schedule to the protective order the competitors it intends to bring within the bar against defense employment of an expert who currently works for a competitor. This would eliminate confusion, and leave the parties and any experts with sufficient clarity to determine the latter's current eligibility for retention.

III. RECORD KEPT FOR THE GOVERNMENT OF PERSONS WHO ACCESSED MATERIALS

a) Government proposal:

> 3. Defense counsel shall keep an up-to-date list or log of all counsel, staff, experts, and agents who have accessed the discovery materials, any information based on them, or had it described to them. This log shall be made available to the government upon request. Moreover, if the defense makes copies of the discovery materials or any documents based on the discovery materials, each copy shall be numbered and the defense shall maintain a log of how many copies have been made. This log shall be maintained in the locked room with the discovery materials and shall be made available to the government upon request.

b) Defense proposal:

> No provision for a log at all is necessary.

c) Rationale for changes:

The Government's proposal is unnecessary and unduly intrusive. It is unnecessary because its proposal as well as that of the defense requires all persons with access to restricted material to acknowledge their obligation to comply with the protective order and to agree for all time to non-disclosure of restricted material outside the case. Defense counsel are answerable to this Court for compliance, as are all individuals who sign the undertaking requested by the Government, which carries sanctions for its violation. A log is redundant.

The Government's view is also inimical to the work product privilege of defense counsel. By requiring that the log be produced to the Government "upon request," as frequently as the Government desires, its production will supply the

Government with a roadmap to the defense, identifying who has reviewed materials, how often, on what dates and times, etc. This would amount to surveillance of defense efforts by the Government, and is unsupportable in the law and untenable as a matter of defending a criminal case.

IV. UNAUTHORIZED ACCESS

a) Government proposal:

> 4. Defense counsel shall promptly notify the government and this Court if any discovery materials are disclosed to anyone not designated by this Order or further Order of the Court, either intentionally or unintentionally. Defendants and any defense experts shall promptly notify defense counsel of any such disclosures.

b) Defense proposal:

> 6. The government and defense counsel shall promptly notify the adverse party and this Court if any "Restricted" Material is disclosed to anyone not designated by this Order or further Order of the Court, either intentionally or unintentionally. Defendants and any defense experts shall promptly notify defense counsel of any such disclosures and government experts shall promptly notify government counsel of any such disclosures.

c) Rationale for changes:

The defense simply has incorporated into an acceptable concept its preferred and more precise definitional term for restricted materials.

V. RETURN OF MATERIALS

a) Government proposal:

> 5. At the end of these proceedings, the Defendants, the defense, and any defense experts shall return all of the discovery materials and any copies to the government, except as directed by the Court. The provisions

of this Stipulated Interim Protective Order shall not terminate at the conclusion of this criminal prosecution and shall continue to safeguard the discovery materials.

b) Defense proposal:

7. At the end of these proceedings, the Defendants, the defense, and any defense experts ***or government experts*** shall return all of the ***"Restricted" Material*** and any copies to the government, except as directed by the Court. The provisions of this Stipulated Interim Protective Order shall not terminate at the conclusion of this criminal prosecution and shall continue to safeguard the discovery materials.

c) Rationale for changes:

We concur with the Government's inclusion of a material-return obligation and make one change (shown in italics) to make it symmetrically applicable to any Government-retained experts as well. The defense version, however, consistently uses the term "Restricted" Material to describe the limited body of discovery materials worthy of restricted treatment.

VI. USE OF RESTRICTED MATERIALS AT TRIAL

a) Government proposal:

None in the current version of its protective order, except a passing reference in Par. 2(f) requiring that the defense may not disclose restricted materials during any legal proceedings on notice to the Government and with the permission of the Court. This may be intended to refer to courts other than this one.

b) Defense proposal:

8. This Stipulated Interim Protective Order does not apply to the use of "Restricted" Material during a court hearing or trial. The use of "Restricted" Material during a court hearing or trial shall be subject to further order of the Court to preserve the confidentiality of that Material.

c) Rationale for changes:

Clearly, a different set of guidelines will be required for pretrial hearings and trial than are set forth in this discovery-centric protective order. The defense proposal makes that explicit to avoid confusion.

VII. SANCTIONS FOR VIOLATION

a) Government proposal:

> 6. Violation of this Stipulated Interim Protective Order may be punishable by contempt of court, whatever other sanction the Court deems just, and/or any other sanctions that are legally available.

b) Defense proposal:

> 9. Violation of this Stipulated Interim Protective Order may be punishable by contempt of court, whatever other sanction the Court deems just, and/or any other sanctions that are legally available.

c) Rationale for changes:

We concur with the government's inclusion of a sanctions provision and make no change to its text. It is renumbered due to the defense version having included additional earlier paragraphs.

VIII. NO EVIDENTIARY EFFECT TO DESIGNATION

a) Government proposal:

7. A designation of documents or information as trade secret shall have no evidentiary effect and the Defendants reserve the right to dispute that designation at trial or on appeal.

b) Defense proposal:

10. A designation of documents or information as trade secret shall have no evidentiary effect and the Defendants reserve the right to dispute that designation at trial or on appeal.

c) Rationale for changes:

We concur with the government's inclusion of a no-evidentiary effect provision and make no change to its text. It is renumbered due to the defense version having included additional earlier paragraphs.

III. CONCLUSION

We believe that the defense proposal provides an appropriate level of protection for true Lilly trade secrets; enables the defense to locate experts who may render assistance and/or testify at trial without mortgaging their employment future anywhere in the world; and is consonant both with the constitutional rights of the defendants and to counsel's right to safe keep their work product without being forced to create a trail allowing the Government to shadow the defense effort.

Dated: November 4, 2013

Respectfully submitted,

/s/ David J. Hensel

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of November, 2013, I electronically filed the forgoing with the clerk of the court by using the CM/ECF system. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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